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No. 87-1040

In the Supreme Court of the United States

OCTOBER TERM, 1987

MICHAEL C. MILLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly applied 18 U.S.C. (Supp. IV) 3292 to suspend the statute of limitations when the underlying criminal conduct took place before Section 3292 became effective.

2. Whether 18 U.S.C. (Supp. IV) 3505, which permits the authenticity and reliability of foreign business records to be established through a certification completed by the foreign recordkeeper and executed under penalty of perjury, violates the Confrontation Clause of the Sixth Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 830 F.2d 1073.

JURISDICTION

The judgment of the court of appeals was entered on October 22, 1987. The petition for a writ of certiorari was filed on December 21, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On April 3, 1986, petitioner was indicted by a grand jury sitting in the Central District of California. The indictment alleged that petitioner obtained $1,135,533 by fraud and that he laundered the money through banks in the United States, the Cayman Islands, Austria, and Switzerland. He was charged with wire fraud (18 U.S.C. 1343),

two counts of mail fraud (18 U.S.C. 1341), and transportation in foreign commerce of property taken by fraud (18 U.S.C. 2314). On a conditional plea of guilty, petitioner was convicted of wire fraud. He was sentenced to two years' imprisonment and was ordered to pay restitution of $1,135,533. The court of appeals affirmed (Pet. App. A1-A10).

1. In 1978, petitioner befriended John Louis Paanakker, a 21-year old man who had recently moved from Germany to California. Paanakker was about to receive a large inheritance in stocks, and petitioner persuaded him to invest the inheritance in the Cayman Islands. In July 1980, petitioner traveled to the Cayman Islands and set up a company called Humberstone, Hatfield & Co., Inc. He also opened a company account at the Bank of Nova Scotia over which both he and Paanakker would have authority. Petitioner told Paanakker, however, that Paanakker would be the only person authorized to withdraw money from the account. Pet. App. A3.

In September 1980, Paanakker sold his inherited stock and received $1,135,533 for it. Paanakker than gave petitioner a check in that amount drawn in favor of the Humberstone company. Petitioner later assured Paanakker that he had wired the money to the Humberstone bank account, and he represented that bearer bonds had been purchased with the money. In fact, no bearer bonds were purchased, and Paanakker's money was never deposited in the company account. Instead, in early October 1980, petitioner sent a cable to Barclays Bank International in the Cayman Islands transmitting the $1,135,533 to his own account. He then instructed Barclays Bank to transfer the money to his personal account at a bank in Austria. At petitioner's direction, the money was then transferred again to his accounts at two different banks in Switzerland. In December 1980, petitioner told Paanakker that he

had received the bearer bonds, but that the bonds had been stolen when his house was burglarized. As a result, petitioner said, Paanakker had lost his inheritance. Pet. App. A4.

2. After Paanakker reported his suspicions to the FBI in 1982, a grand jury began investigating the transactions. On September 9, 1983, the government made an official request for the records of the Bank of Nova Scotia and Barclays Bank International in the Cayman Islands. That request was granted five months later on February 13, 1984. Based on information revealed by those records, the government then asked for the records of the Austrian bank on July 25, 1984. That request was granted four months later on November 28, 1984, and the records were received on December 26, 1984. Based on the information in those records, the government requested the records of the Swiss bank on February 25, 1985. Six months later, on August 26, 1985, that request was granted. Pet. App. A4.

On the government's application, the district court entered an order on July 17, 1985, suspending the statute of limitations under 18 U.S.C. (Supp. IV) 3292 for the nine-month period during which the official requests for the bank records in the Cayman Islands and Austria had been pending. On November 20, 1985, the district court granted the government's application for another suspension of the statute of limitations for the six-month period during which the request for the bank records in Switzerland had been pending. The grand jury returned its indictment less than five months later on April 3, 1986. Pet. App. A4-A5.

3. After petitioner was indicted, the government notified him that it intended to offer the foreign business records in evidence at trial pursuant to 18 U.S.C. (Supp. IV) 3505. Petitioner moved to exclude that evidence and to dismiss the indictment on the ground that it was barred by

the five-year statute of limitations, 18 U.S.C. 3282. When the district court denied both motions, petitioner entered his conditional guilty plea, reserving the right to challenge the district court's rulings. Pet. App. A5.

4. The court of appeals affirmed (Pet. App. A1-A10). The court first rejected (*id.* at A5-A6) petitioner's argument that the district court improperly suspended the statute of limitations by applying 18 U.S.C. (Supp. IV) 3292 retroactively. It observed (Pet. App. A5) that Section 3292 was enacted as part of the Comprehensive Crime Control Act of 1984 and became effective on November 12, 1984. See 18 U.S.C. (Supp. IV) 3292 note. The court then determined that the tolling provision of the statute "was not applied * * * retroactively," because Section 3292 "was in effect when the district court orders were entered suspending the statute of limitations" (Pet. App. A5-A6). Relying on *Bradley* v. *Richmond School Bd.*, 416 U.S. 696 (1974), the court of appeals explained that "[t]he district court simply applied the law in force" (Pet. App. A6).

The court of appeals also rejected (Pet. App. A7-A10) petitioner's Confrontation Clause attack on the constitutionality of 18 U.S.C. (Supp. IV) 3505, which provides that foreign business records shall not be excluded as evidence by the hearsay rule if the records are accompanied by a specified foreign certification. The court observed (Pet. App. A9) that the Confrontation Clause does not require the exclusion of hearsay of an unavailable declarant if the hearsay bears "indicia of reliability." The court also noted (Pet. App. A9-A10) that all the foreign bank records at issue were accompanied by statements and attestations from bank employees sufficient to indicate their reliability. The court further observed (*id.* at A10) that the admission of business records is one of the firmly

rooted exceptions to the hearsay rule that does not offend the Confrontation Clause.

The court of appeals pointed out (Pet. App. A10) that "[t]he novelty of [Section 3505] is to admit the records without confrontation by the defendant with the record-keepers." It noted (*ibid.*) that "[n]o motive is suggested that would lead bank officials to change, distort, or manipulate the records at issue here." The court went on to conclude (*ibid.*) that the application of Section 3505 to the bank records in this case would not run afoul of the Confrontation Clause because "[t]he recordkeepers have, under criminal penalties in their own countries, asserted that the records are records kept in the course of business" and, "[i]f the records were in fact inaccurate, it was within [petitioner's] power to depose the recordkeepers and challenge the records."

ARGUMENT

1. Petitioner first renews his contention (Pet. 7-15) that the district court erred by applying 18 U.S.C. (Supp. IV) 3292 to suspend the five-year statute of limitations set forth in 18 U.S.C. 3282. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals.

There is no merit to petitioner's argument that the suspension provisions of 18 U.S.C. (Supp. IV) 3292 do not apply if the underlying criminal acts took place before the effective date of Section 3292. In *Bradley* v. *Richmond School Bd.*, 416 U.S. 696 (1974), the Court reaffirmed the long-standing principle "that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is a statutory direction or legislative history to the contrary" (*id.* at 711).

As the court of appeals observed, that is what the district court did when it applied Section 3292 to suspend the statute of limitations in this case: it "simply applied the law in force" (Pet. App. A6). It did not apply Section 3292 "retroactively" (*id.* at A5).

Petitioner mistakenly relies (Pet. 7-8, 9) on the general "policy of repose" reflected in the statute of limitations to override the elementary principle that a new law is fully applicable after its effective date in the absence of legislative direction to the contrary. To be sure, the function of a statute of limitations "is to limit [an individual's] exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature has decided to punish by criminal sanctions." *Toussie* v. *United States*, 397 U.S. 112, 114 (1970). It is well established, however, that Congress may modify or extend a statute of limitations without violating the Ex Post Facto Clause, because changes in a statute of limitations are mere procedural changes. See *United States ex rel. Massarella* v. *Elrod*, 682 F.2d 688, 689 (7th Cir. 1982), cert. denied, 460 U.S. 1037 (1983); *Clements* v. *United States*, 266 F.2d 397, 399 (9th Cir.), cert. denied, 359 U.S. 985 (1959); *Falter* v. *United States*, 23 F.2d 420, 425-426 (2d Cir.) (Learned Hand, J.), cert. denied, 277 U.S. 590 (1928).[1] Likewise, Congress can enact legislation that

[1] For example, in *Clements* v. *United States, supra,* the court rejected the notion that the application of a new statute of limitations to past offenses is, in all instances, a retroactive application of the law. The court held that there was no Ex Post Facto Clause violation because the "amendment was not retroactive in substance or effect" when applied to crimes that were not already time-barred when the law went into effect. 266 F.2d at 399. The court reasoned that because an indictment could have been validly returned at the time the amendment was passed, an extension of the limitations period for the same offense could not be deemed a retroactive law (*ibid.*).

allows a court to suspend a statute of limitations for both pending and future cases. That is what Congress did here.

Petitioner mistakenly contends (Pet. 10, 13) that Section 3292 may not be applied to pending cases involving criminal conduct occurring before that section's effective date, in the absence of an expression of congressional intent that it be so applied.[2] To the contrary, this Court's decision in *Bradley* soundly "reject[ed] the contention that a change in the law is to be given effect in a pending case only where that is the clear and stated intention of the legislature" (416 U.S. at 715 (footnote omitted)). Indeed, the Court made it plain that the rule is just the opposite: "a court is to apply the law in effect at the time it renders its decision, unless * * * there is statutory direction or legislative history to the contrary" (*id.* at 711).[3] And as petitioner concedes (Pet. 10), the legislative history does not in any way indicate that Congress intended Section 3292 to be inapplicable to cases involving criminal conduct occurring before the date of its enactment.

Petitioner suggests (Pet. 13-15) that the court of appeals' decision conflicts with *United States* v. *Richardson*,

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[2] Petitioner has never claimed that the suspension provision of Section 3292 violates the Ex Post Facto Clause. Indeed, he conceded before the court of appeals that the issue here is purely a matter of statutory construction: whether Congress intended that Section 3292 be applied in cases where the criminal conduct occurred before the section's effective date. Appellant C.A. Br. 14; Appellant C.A. Reply Br. 4 n.2.

[3] Accordingly, the court of appeals' observation that Section 3292 "was in effect" when the suspension orders were entered does not beg the question, as petitioner argues (Pet. 11). To be sure, the ultimate issue is whether Congress intended Section 3292 to apply in all cases after the effective date of the section. But as the Court made clear in *Bradley*, a statute is to be applied in all such cases unless Congress manifest a contrary intention.

393 F. Supp. 83 (W.D. Pa. 1974), aff'd, 512 F.2d 105 (3d Cir. 1975). There is, in fact, no direct conflict. In *Richardson*, the Third Circuit affirmed the district court's conclusion that a new law changing the commencement date of the statute of limitations for failing to register with the Selective Service System (50 U.S.C. App. 462(d)), was not intended to be applied to offenses committed before the law's effective date. The question decided in the *Richardson* case involved a different statute and thus is only indirectly relevant to the proper interpretation of 18 U.S.C. (Supp. IV) 3292. In any event, *Richardson*'s reasoning is at odds with the principles recognized by this Court in *Bradley*. In *Richardson*, the Third Circuit relied on Congress's silence to create a presumption that Congress did not intend the new law to apply when the offense occurred before the Act's effective date (512 F.2d at 106). The court neither mentioned nor attempted to reconcile that conclusion with *Bradley*. Instead, the court simply relied on the general proposition that a law is presumed to operate prospectively unless there is a clear indication to the contrary (*ibid.*), without explaining how the application of a new statute of limitations to a pending case—a prospective application of the law—runs afoul of that proposition.

2. Petitioner also renews his contention (Pet. 15-24) that 18 U.S.C. (Supp. IV) 3505 violates the Confrontation Clause because the custodian who provides the certification for foreign business records is not subject to cross-examination. That contention is meritless.

Section 3505 was enacted in response to the difficulties encountered by the government in securing the admission of foreign business records at trial. Because the custodians of such records generally are not subject to subpoena, prosecutors cannot compel their presence at trial to authenticate and provide foundational testimony for the admission of foreign records. See Fed. R. Crim. P.

17(e)(2). Prior to the enactment of Section 3505, prosecutors were thus forced to take the depositions of foreign custodians under Fed. R. Crim. P. 15 to authenticate foreign records. The deposition procedure, which is dependent upon the consent of the foreign government, was time-consuming and very costly.

Contrary to petitioner's contention (Pet. 21-23), Congress's elimination in Section 3505 of a face-to-face confrontation with the custodian of the records due to a perceived need to reduce costs and minimize inconvenience does not render Section 3505 constitutionally infirm. It is well established that the admission at trial of hearsay statements of an unavailable declarant does not offend the Confrontation Clause if the out-of-court statements bear sufficient "indicia of reliability" to assure an adequate basis for evaluating the truth of the declaration. *Bourjaily* v. *United States*, No. 85-6725 (June 23, 1987), slip op. 10; *Ohio* v. *Roberts*, 448 U.S. 56, 65-66 (1980); *Dutton* v. *Evans*, 400 U.S. 74, 83-90 (1970). In enacting Section 3505, Congress carefully protected the rights of criminal defendants under the Confrontation Clause by imposing requirements to ensure the admission of only demonstrably reliable evidence. See H.R. Rep. 98-907, 98th Cong., 2d Sess. 3-4 (1984).

As the court of appeals correctly concluded (Pet. App. A7-A10), the custodian's certification under 18 U.S.C. (Supp. IV) 3505 for the admission of foreign business records is sufficiently reliable to pass constitutional muster. Section 3505 requires that foreign business records be authenticated by a custodian of the records or other qualified person. The certification must be executed under circumstances that would expose the maker to criminal penalties if it were falsely made. The certification must also establish that the records are originals or duplicates of original records, and it must establish that the records are

business records within the meaning of Fed. R. Evid. 803(6). Finally, Section 3505 provides that the certified records are not admissible if the source of information or the method or circumstances of their preparation indicate a lack of trustworthiness. And, as the court of appeals pointed out (Pet. App. A10), it is within a defendant's power to depose the recordkeeper to challenge the accuracy of the records. Accordingly, the custodian's certification under Section 3505 provides sufficient guarantees of reliability to satisfy the Confrontation Clause. Cf. *United States* v. *Davis*, 767 F.2d 1025, 1031-1032 (2d Cir. 1985); *United States* v. *Leal*, 509 F.2d 122, 127 (9th Cir. 1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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